

IN RE: PETITION FOR SPECIAL EXCEPTION*		BEFORE THE
(5401 Campbell Boulevard)		
15 th Election District	*	OFFICE OF
6 th Council District		
Whitemarsh Associates, LLC	*	ADMINISTRATIVE HEARINGS
<i>Legal Owner</i>	*	FOR BALTIMORE COUNTY
Petitioner	*	Case No. 2019-0534-X
* * * * *		

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of a Petition for Special Exception filed on behalf of Whitemarsh Associates, LLC, Legal Owner (“Petitioners”). The special exception petition was filed pursuant to § 502.1 of the Baltimore County Zoning Regulations (“BCZR”) for a fuel service station in the ML IM zone, and for such further relief as the Administrative Law Judge (“ALJ”) may require.

Christopher Hoffman appeared in support of the petition on behalf of the conditional contract purchaser, Wawa, Inc. Adam M. Rosenblatt, Esq. represented the Petitioner. Patrick Richardson, the engineer who prepared the site plan, also appeared and was recognized as an expert in land use, engineering, and the BCZR. The site plan was admitted as Petitioner’s Exhibit 1. A traffic engineer, Mickey Cornelius appeared and was recognized as an expert in the field. Finally, Edward Steere, AICP, also appeared and was recognized as an expert in land use, real estate development, and the BCZR. There were no Protestants or interested citizens in attendance. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Environmental Protection and Sustainability (“DEPS”) which indicated that the property must comply with Critical Area regulations, and that the plans must also be presented to the Development Review Committee (“DRC”) for determination of plan process prior to the issuance

of any permits for grading and construction. In addition, ZAC comments were received from the State Highway Administration (“SHA”) indicating that the Petitioner must contact the SHA to obtain an entrance permit. Finally, the Department of Planning (“DOP”) also submitted comments in opposition to the requested relief, primarily because of the flood plain issue discussed below.

BACKGROUND

The subject parcel was the subject of Case No. 2019-0451-SPH in which a floodplain waiver was requested and ultimately granted. Initially, by Order dated December 5, 2019 the undersigned denied the waiver based on the misconception that even after all the stormwater construction was completed the proposed Wawa development would still be at least partially within the floodplain. The Petitioner filed a timely Motion for Reconsideration which explained and documented the fact that the floodplain waiver would enable Petitioner to construct such stormwater management facilities as would be required to take the proposed Wawa development *outside* the floodplain. Based on these representations I granted the requested waiver, stating that *“I will defer to the judgment and expertise of the Director of Public Works, who has reviewed Petitioner’s engineering studies and concludes that the proposed floodplain site work “will have zero adverse impact on the floodplain.”* However, I condition this approval as follows:

“All provisions of Baltimore County Code (“BCC”) § 32-8-207 shall be satisfied before any permits are issued or any development may proceed.”

In the instant case Mr. Rosenblatt acknowledges that should the requested Special Exception be granted the Petitioner must still comply with all provisions of BCC § 32-8-207 before they will be granted permits for any of their proposed construction (other than stormwater management construction related to floodplain ameliorization). In other words, they must still obtain all required floodplain waivers and permits from all federal, state, and county agencies.

However, as Mr. Rosenblatt also points out, under the holding in *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 289 (2017), in a case such as this, a petitioner, “is not prevented by the BCZR from proceeding with the request for the Special Exception before receiving approval for the proposed floodplain relocation.” It is in this context that the Special Exception relief in this case will be considered. In other words, as I made clear to Mr. Rosenblatt and the Petitioner, the merits of the Special Exception petition will be considered separate and apart from the floodplain issue; but any Special Exception relief I grant will still be conditioned upon them obtaining all the necessary floodplain approvals. Requiring the Petitioner to comply with all the onerous floodplain regulations will satisfy the sustainability goals of the Baltimore County Master Plan 2020, which requires the continued enforcement of development regulations “for the protection of water quality, streams, wetlands, and floodplains.” *Id.* at 156.

FINDINGS OF FACT

The site is approximately 4.05 acres in size and zoned ML and IM. As depicted on the site plan, the subject property lies at the southeast corner of Philadelphia Road and Campbell Avenue in White Marsh. As described by the witnesses and as depicted in an aerial photograph (Petitioner’s Exhibit 4), the surrounding area consists of a variety of commercial uses such as a FedEx Ground facility, car dealerships, a Lowe’s Home Improvement store, and assorted fast food restaurants. As discussed below, there are four other fuel service stations within the relevant “trade area” of this site; however, none are in close proximity –as also demonstrated by the aerial photo. Of note, there are no residential uses nearby.

A. The requirements of BCZR §§ 253 and 405 concerning fuel service stations

Because there were no protestants at the hearing Mr. Rosenblatt was allowed to proffer the following. The proposed development is for a 4700 sq. ft. Wawa convenience store and 12 fuel

pumps covered by canopies. The site plan fully conforms with the standards set forth in BCZR § 405.4. There is far more than the required square footage; the proposed parking exceeds requirements; the landscape transition areas are provided and all landscaping will comply with the Baltimore County Landscape Manual. Further, all setbacks, traffic flow, and parking regulations are satisfied. Finally, restrooms, water, and compressed air pumps will also be provided. At present, there are no plans for seating within or outside the Wawa store.

In its ZAC comments the DOP noted that under BCZR § 253.2.B the grant of a special exception for a fuel service station must be based on a finding that “such use will serve primarily the industrial uses and related activities in the surrounding industrial area.” And DOP observes that the proposed facility will not provide truck refueling access for the nearby FedEx facility. While this is true, I’m quite sure that FedEx has its own fueling facilities. Moreover, I find that the proposed Wawa facility will indeed primarily serve the surrounding industrial area, *and related activities*, by providing fuel and all the accoutrements of a modern fuel/food/beverage store to the employees and customers of the surrounding businesses. As noted above, there are no other such facilities in the immediate vicinity.

Petitioner’s land use and planning expert, Edward Steere, produced a detailed and informative impact analysis for this proposed project. (Petitioner’s Exhibit 10A, and 10B). this impact analysis clearly establishes that this proposed Wawa facility will primarily serve the surrounding industrial uses, as required by BCZR § 253.2.B. This impact analysis also establishes that there is sufficient unmet demand for fuel and services to support this additional fuel/convenience store in this proposed location. In fact, after considering the existing and projected average daily car trips in the area, as well as the four other existing fuel/convenience centers, Mr. Steere found that there is an unmet demand of over 5 million gallons of fuel per year.

Further, even if there was opposition from any of the other four fuel centers (and there is not), that would not be a valid reason to deny the special exception because “prevention of competition is not a proper element of zoning.” *Attar, supra*, 451 Md. at 290, quoting, *Kreatchman v. Ramsburg*, 224 Md. 209, 219 (1961). Finally, there are no abandoned fuel stations within a half mile of the site, so the special exception is permitted under BCZR § 405.3.

B. The requirements of BCZR § 502.1 governing Special Exceptions

In order to comply with BCZR § 502.1 a special exception request must satisfy nine separate conditions, if applicable. The record evidence in this case satisfies all applicable conditions. First, provided that the developer complies with all federal, state and county floodplain laws, the proposed special exception use will not, in my view, be detrimental to the health, safety or general welfare of the surrounding areas.

Second, the traffic engineer, Mr. Cornelius, produced a detailed traffic study based on state and county standards that establishes this proposed use will not create congestion on the surrounding roads. (Petitioner’s Exhibit 7). This traffic study was approved by the SHA in December 2018 and is valid for 5 years. (Petitioner’s Exhibit 8). As Cornelues explained, the vast majority of the projected traffic in the area consists of customers and employees of the existing businesses in the area. In other words, it is already present. The Wawa will merely experience “pass by” traffic; that is, motorists who are heading to these other existing locations who stop in for fuel and/or convenience items at this proposed Wawa. In addition, and as requested by the SHA, the access off of Philadelphia Road will be a single right turn only lane into the Wawa, with no egress onto Philadelphia Road. This will serve to avoid traffic hazards and congestion on that busy arterial road. The sole egress point will be on Campbell Boulevard well back from its intersection with Philadelphia Road. Just east of the proposed site Campbell Boulevard dead ends,

and there are only a couple businesses located east of this proposed site. In sum, this proposed special exception use will have minimal impacts on traffic.

I also find that this proposed Wawa will not cause a fire hazard, will not overcrowd the land, will not cause an undue concentration of population, and will not interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public services. There are no basic service map issues in this vicinity.

Finally, as to the remaining § 502.1 criteria, which all relate to environmental impacts, I again find that so long as the floodplain issues are fully addressed this proposed Wawa will have no greater environmental impact at this location than it would anywhere else in the BL or IM zones.

Special Exception

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC, supra*, where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use. Based on the record evidence in this case I find that the special exception relief should be granted under these legal standards.

THEREFORE, IT IS ORDERED this **2nd** day of **July, 2020**, by this Administrative Law Judge, that the Petition for Special Exception seeking relief from BCZR § 502.1 for a fuel service station in the ML IM zone, be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at its own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would be required to return the subject property to its original condition.
2. Prior to issuance of Permits, Petitioner must comply with the ZAC comments submitted by DEPS and SHA; copies of which are attached hereto and made a part hereof.
3. As stated in the prior Order in Case No. 2019-0451-SPH, all provisions of BCC §. 32-8-207 shall be satisfied before any permits are issued or any development may proceed.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Signed
PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlw